A Tragic Constitutional Court Judgment on Abortion

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The law providing for the illegality of abortion has been in force in Poland since 1993. Now, a judgment of the Constitutional Court of 22 October 2020 (ref. K 1/20) declared that one of the three exceptions allowing abortion is unconstitutional. Namely, a situation where '*prenatal tests or other medical premises indicate a high probability of a serious and irreversible impairment of the fetus or an incurable life-threatening illness of the fetus*' (This is the embryopathological exception. In the application and justification, it is described – incorrectly and stigmatising – as 'eugenic'). Consequently, abortion will continue to be permitted in two cases: a threat to a woman's life or health and in the case of a rape or incestuous pregnancy. As early as 23 years ago, another judgment of the Constitutional Court limited the admissibility of abortion in the case of difficult living conditions or a woman's difficult personal situation. Abortion in Poland is not only prohibited, with the exceptions indicated, but also punishable (Article 152 of the Penal Code). A woman whose pregnancy has been terminated, however, is not punished.

The end of the so-called abortion compromise – reopening the dispute or opening a Pandora's box

The K 1/20 judgment should not have appeared. Neither should it have appeared in this Tribunal (due to reservations concerning the appointment of some judges and the legitimacy of the Court itself). In particular, it should not have been handed down during a pandemic when all efforts should have been directed towards fighting it. The fundamental abortion dispute has been reopened and the 1993 so-called abortion compromise has been ended. It provoked a public outcry. It was anticipated that the fear of the pandemic would keep people from taking to the streets. That is not what happened.

The fact that this sentence has been passed illustrates how far **we have moved towards religious and moral fundamentalism**. The Polish Constitution has its origins in the idea of inclusiveness and openness to many world views. This feature is currently being ignored in practice, but it is undoubtedly present in the origins of the Constitution and is still visible in its text, especially in the preamble. Inclusivity assumes that the state – the legislator, but also the Constitutional Tribunal (CT) – will not be fundamentalist in relation to one world view. This was rejected in the ruling of the CT. In the discourse on abortion, we have returned to the level of the dispute: *pro-choice versus pro-life,* which is inconclusive on ideological and world-view grounds.

Lech Garlicki (professor of law and former judge of the CT), in his dissenting opinion in the K 26/96 judgment, which found abortion due to the social situation of a woman unconstitutional, starts by reminding us that '***it is not the role or task of the constitutional court to resolve general issues of a philosophical, religious or medical nature, as these are issues beyond the knowledge of the judges and the competence of the courts****. Regardless of the moral assessment of abortion, the Constitutional Court can only rule on the legal aspects of this issue[…]. The Constitutional Court is only called upon to assess the constitutionality of the laws it examines, but it cannot replace Parliament in making assessments, establishing the hierarchy of objectives and selecting the means to achieve them. The principle of separation of powers prohibits the Tribunal from entering into the role of legislator.'*

For several years now, the CT in Poland has changed its functions[1)]The anatomy of this phenomenon, cf. M. Pyziak-Szafnicka, The *new role of the Constitutional Tribunal*, Pa#stwo I Prawo [State and Law] No. 5/2020.: From an independent controller of the constitutionality of the law **to a handyman of the ruling parliamentary majority** for projects whose odium is not intended to fall on parliament. The *Sejm*, the lower house of Poland's bicameral parliament, simply hid behind the Court's back**.** The motion rested with the Court for several years. The political project that the verdict was supposed to be served now was clear.

The abortion sentence handed down in the midst of a raging plague, the chaos associated with it and the collapse of the health service, divisive and irritating, was intended to attract public attention. In that it succeded. However, it caused very violent demonstrations. It may be of interest to political scientists to assess how far and why these developments have exceeded expectations. **The lawyer is more interested in the effects of the judgment on the law and its functioning, and the opportunities created by the legislation modified by the judgment of the Constitutional Tribunal.** This struggle takes place in the conditions of a reopened ideological dispute and its freezing effects on prenatal diagnosis in general, even before the announcement of the judgment.

Some of the comments that have been made about its effects are **politically motivated misinformation.** This is particularly true regarding statements made by the leader of the ruling party. He alleged a lack of room to manoeuvre for the Court and the need to amend the Constitution if he somebody wanted to move away from its rigor. The applicants' intention was, above all, to exclude the exception legalizing the abortion of foetuses with Down's syndrome. The CT, by contrast, cut wide, covering all embryopathologies, even the most severe ones, where carrying and giving birth to a child unable to live is placed on a par with forcing torture. In doing so, the sentence has abandoned the sparing formula of the scope or interpretation judgment, as well as the instrument of postponing its effectiveness.

The radicalism of the scope of the judgment is linked to the breadth and absolutism of the interpretation of the Article 38 of the Constitution: *'The Republic of Poland shall ensure legal protection of life for every human being'.* This provision does not contain any indication that this is about life from conception (during the preparatory work on the Constitution such a proposal was even rejected).

The ‘right to life’ is also not the same as the gradual ‘right to the protection of life’ (Article 38 of the Constitution). In the K 1/20 case, the court adopted a broad interpretation of this provision which is not covered by its content. Only auxiliary reference was made to human dignity (Article 30 of the Constitution). In this way, a path was opened for the prohibition and penalisation of another of the remaining two exceptions to permissible abortion, i.e. a case where pregnancy is the result of a crime (incest or rape). Article 30 could open the way to weighing the balance of dignity of two entities on the scales. Not only the dignity of the unborn child (*nasciturus*), as is the case with the judgment, but also the dignity of the mother, who is forced to give birth, and to the dignity of *moriturus (an* unborn child about to die).That would be the weighing of two dignities. Meanwhile, **reference to Article 38 (and this is included as the right to life, not the right to protect it) justifies only one abortion exception motivated by the threat to the life of the mother.** The health of the mother could not be a factor in this, because life would be put to weigh on the one hand, and health on the other. Life would always outweigh health. In this way, the K 1/20 judgment is a significant sign of further developments in line with the *pro-life* offensive and the appeals to parliamentarians by the Church’s leadership.

Against the background of the K 1/20 judgment, there are real doubts of interpretation worth discussing:

- **whether, after the entry into force of the judgment and a change in the legal status of the person concerned, the resulting embryopathologically induced abortion will only be illegal, or whether the doctor[2)]In Poland, the criminalisation of a woman for abortion existed under the rule of the Criminal Code of 1932. The latter was amended in this respect in 1956. performing it will also be criminalised.**
- **The latter is one of the potentially salvatory consequences of the K 1/20 judgment, i.e. an indication of the possibilities that arise before the ordinary courts after the judgment enters into force**.

The status of the K 1/20 judgment and necessity of its publication

The judgment will enter into force automatically, changing the legal status without the need to make any statutory changes – as soon as the judgment is published in the Journal of Laws (Article 192(2) of the Constitution). The Prime Minister is obligated to publish it. Between 2016 and 2018, the government of B. Szyd#o suspended the publication of several judgments of the Constitutional Tribunal, which he considered inconvenient, for months. This was criticised as usurpation and a constitutional tort of the executive.

Since 2015, the Court’s legitimacy is called into question. The reason is the presence of so-called ‘judges – doubles’ (improperly appointed). There are reservations about the correctness of appointing the President of the Court and

the composition of the Court to hear cases. These circumstances were considered by the opponents of the 'abortion' judgment of the Constitutional Tribunal to be the basis for the claim that the judgment in the K 1/20 case does not exist or is invalid. It therefore does not have to be published and has no legal effect, so the legal status in terms of exceptions to the admissibility of abortion has not changed. However, apart from the fact that this reasoning would certainly not be accepted by the prosecution or the executive, this view is unacceptable as regards the structural principle of the Court's judgment. The judgments of the Tribunal as final are not subject to verification as to their possible invalidity – there is no body or procedure to do that. The situation here is different from that in the case of judgments of common courts. **Even the most flawed judgement of the Constitutional Tribunal – in accordance with the Constitution – should be published**[3)]This is why, for example, the view of A. Zoll, who also spoke out in favour of not publishing the judgment, is surprising. Legal experts of the Senate also spoke out in favour of the redundancy of the publication**.. Otherwise, we are embarking on a path of disgracefully open violation of the Constitution, set by Prime Minister Beata Szyd#o. Unlike in the case of common courts, there is no body and no procedure before which proceedings could be carried out which would declare the decision invalid. It is therefore wrong to believe that** the K 1/20 judgment is not binding, is not a judgment and does not need to be announced.

The publication of the judgment, however, opens up a further path resulting from Article 7 of the Constitution ('*Public authorities shall act on the basis, and within the limits of the law*'). It includes:

- **the legislator**, who can act here by way of a law and has a completely free field of action, without being bound by the direction and content of the judgment. It is possible here to both tighten up or soften the law, or even to repeat what the Court has found unconstitutional. There is no *res iudicata* here, and the Court can carry out further checks on new laws repeating the eliminated provisions. The Court could also change its view on this occasion (another matter which is of significance for the credibility of the adjudicators).
- alongside the legislator, the second actor on the stage opened by this judgment are the **common courts,** e.g. a criminal court presented with case of a doctor who performed an abortion. They are free to – and I have been an advocate of such direct application of the constitution by the courts for years – to submit their own assessment of constitutionality in the concrete application of the law to the legal state shaped by the announced judgment of the Constitutional Tribunal.

Therefore, despite the CT judgment removing the embryopathological exception, the criminal court, when considering the case of a doctor who has nevertheless carried out such an abortion, may refuse to apply the provision of the criminal code to be applied in such a case. This applies to all causes of unconstitutionality (defective court staffing or for material law reasons). Such a situation has already occurred in our country in relation to Article 138 of the Code of Small Offences, previously declared unconstitutional by the Court[4)]The provision provided for a penalty for an entrepreneur who unjustifiably refuses to conclude a business services contract. The background to the case was a refusal by the entrepreneur to print advertising

materials for LGBT organizations. The printer claimed that his conscience did not allow him to accept such an order. He was punished. At the time, the Constitutional Court ruled that the punishment of Article 138 of the Code of Small Offenses was unconstitutional. P. Szymaniak, *Judgment of the Constitutional Tribunal declared the former* DGP of 3 November 2020 *null and void*. This would not mean an 'annulment' of the judgment, but a refusal to apply the penal effects it would have on the legal system, and only for the purposes of a specific case.

After the judgment: Salvatory proposals

After the publication of the judgment K 1/20, the scope of legal abortion will change. The provision on the legality of abortion for **embryopathological reasons will lose its force, and abortion will become illegal in such cases**. **I have no doubt that from that moment on, it will also be prosecuted as a crime (Article 152 of the Criminal Code). After all, this happened after the entry into force of the 1997 judgment of the Constitutional Tribunal, which also eliminated another, fourth exception from the legal system** allowing abortion for reasons related to a woman's difficult life situation. What was then covered by the deconstitutionalised exception increased the scope of the hypothesis of the principle of criminalisation. Why should it be different now?

A proposal, identical to the one already discussed in 1997, to limit the effect of the judgment to the prohibition, but not the criminalisation of embryopathological abortion, has been put forward as part of a **salvatorial search to mitigate the rigour of the judgment.** The finesse of this interpretative proposal (which assumes that the ricochet effect of CT judgments should not be extended to punishability as that is a matter reserved for the legislator) unfortunately has a practical flaw. Firstly, the argument that another constitutional practice was adopted after the K 26/96 judgment would somehow have to be dealt with. Secondly, such a solution would have to be accepted by the public prosecutor's office and would also have to be discussed with the loud proponents of tightening up the law on abortion.

Other salvatorial ideas, i.e. interpretative proposals that are put forward in the hope of being promoted, have the same shortcoming:

- **A broader approach than hitherto to the mental health of the mother (use of the exception still existing in the law of 1993, allowing for abortion if the protection of the life and health of the mother so requires)**
- **The creation of an exception construed by courts based on Article 47 of the Constitution as directly applicable, formulated as a subjective right of women to abortion.** The balance of such thesis within the framework of the ongoing 'war on interpretation' is unrealistic. The current atmosphere of the discourse is not conducive to this (especially as there are also very active supporters of further tightening of anti-abortion regulations). At the same time, there is no time to shape a line of judgement, and the existing state of opportunism/determination of the courts could be an obstacle.

The President of the Republic of Poland took the initiative of the **legislative amendment, proposing an exception legalizing embryopathological abortion** when *'prenatal tests or other medical indications indicate a high probability that a child will be born dead or burdened with an incurable disease or defect, leading inevitably and directly to the child's death, regardless of the therapeutic measures applied'*. This proposal is probably not taken very seriously by the proposers themselves, since, when asked about the practical details of the concepts, they say that the 'fine-tuning' of which would already take place in Parliament. The proposal is blank, it does not prejudge anything, but contains a rubber standard. Despite the Prime Minister's optimistic assessment that it would be a 'solution to existing problems', that is clearly not the case.

- **No doctor will risk a proper diagnosis, without the certainty that such a provision will protect him from liability or even prosecution.**
- **On this basis, no woman would be sure to find a doctor – and in time at that. In such a case, the woman remains in a blind spot between the medical conscience clause and the diagnostic opportunism of prolonging prenatal examinations and issuing a diagnosis.**
- **Therefore, a legislative proposal of this kind does not even mean a return to the level of admissibility of an abortion prior to the judgment. It also means a blow to prenatal examinations themselves.**

What the result of this really is: A wobbly, unclear and hypocritical legal state.

References

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